



**Congressional
Research
Service**

Memorandum

February 15, 2001

TO: House Subcommittee on the Census,
Government Reform Committee

FROM: American Law Division

SUBJECT: Secretarial Retrieval of Delegations of Authority to a Subordinate

You have inquired as to the options available to the new Secretary of Commerce with respect to retrieving a delegation of authority to a subordinate official by his predecessor in office. While such retrievals are usually accomplished by a simple secretarial order, the delegation in question was effected through a notice and comment rulemaking that contained unusual terms. As a consequence our response is more extended to consider the unique circumstances involved.

On June 20, 2000, the Secretary of Commerce published a notice of proposed rulemaking in the Federal Register that would set forth how the Census Bureau would carry out the responsibility of reporting tabulations of population to States and localities under the Census Act. See 65 F.R. 38370. The proposed rule would establish a process for the release of data to the States which would include the creation of a committee of career Census Bureau officials who would advise the Census Director. The proposed rule also contained a delegation of authority from the Secretary to the Director to make the final determination regarding the methodology to be used in calculating the tabulations to be reported pursuant to 13 U.S.C. 141 (c), and provided that "the determination of the Director of the Census shall not be subject to review, reconsideration, or reversal by the Secretary of Commerce." *Id.* The rationale for the non-reviewable delegation was stated to be to avoid any appearance that considerations other than those relating to statistical science were being taken into account. *Id.*

During the public comment period members of House committees with jurisdiction over census matters, including the Chairman of the Government Reform Committee, the Chairman of the Subcommittee on the Census, and four majority party members of the Census Subcommittee, submitted comments for the rulemaking record that objected to the proposed delegation on the ground that it would unlawfully divest the Secretary of the statutory obligation and responsibility vested in him by 13 U.S.C. 195 to make final decisions with respect to the reporting of tabulation determinations.

In issuing the final rule on October 6, 2000, 65 F.R. 59713, the Secretary responded to the congressional objection, stating that his authority under 13 U.S.C. 4 to "delegate the performance of such functions and duties [imposed on him by the Census Act]" provided him "with broad authority to take the steps he deems appropriate to carry out his responsibilities under the law, and that language does not establish limitations on the Secretary's ability to delegate the performance of his functions and duties under the Census Act." 65 F.R. at 59715. The Secretary explained that the delegation was not an unlawful divestiture because it is not irrevocable in that it could be revoked by a subsequent rulemaking. 65 F.R. 59715. However, "in order to erase any doubt that the delegation is not a divestiture of obligations or responsibility by the Secretary," Section 101.1 (a) of the final rule was amended to provide as follows: "(5) Nothing in this section diminishes the authority of the Secretary of Commerce to revoke or amend this delegation of authority or relieves the Secretary of Commerce of responsibility for any decision made by the Director of the Census pursuant to this delegation. This section shall remain in effect unless or until amended or revoked by the Secretary of Commerce." 65 F.R. 59716.

With these facts and circumstances in mind we submit the following with respect to the options available to the Secretary to retrieve the delegation in question.

Normally, a rule promulgated through notice and comment proceedings must be rescinded or modified in the same manner. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-44 (1983) (*State Farm*). This would mean the commencement of a new rulemaking proceeding with the object of revoking the delegation, and would require inviting public comment for a stated period and, after the close of the comment period, publication of the final rule in the Federal Register. Although section 553 of title 5 does not require a minimum number of days for public comment, agencies traditionally permit at least 30 days. Section 553 (d) specifically requires at least 30 days to elapse after publication of the final rule before it can become effective. Thus, it is possible that a rulemaking proceeding to revoke the delegation could take at least 60 days.

Arguably, however, other options appear available which would shorten the revocation process. Such options are premised on two propositions. First, that Section 553 notice and comment procedures were not required in the first place since the rule in question simply established an internal agency decisional process that is not substantive in nature; that is, it is not a rule that establishes or alters the existing rights, duties or obligations of persons outside the agency. It is, therefore, a "rule [] of agency organization, procedure, or practice" which is excepted from the procedural requirements of Section 553. See 5 U.S.C. 553 (b). The only statutory requirement applicable to such internal agency procedural or organizational rules (and their revisions) is that they be published in the Federal Register. See 5 U.S.C. 552 (a)(1)(A)(B) and (E). As a consequence, under this argument the rule of the *State Farm* case is inapplicable since that matter involved a substantive rule clearly subject to the notice and comment requirements of Section 553. The courts have consistently held that notice and comment is required if the rule makes a substantive impact on the rights and duties of persons subject to regulation. If it does not have such an impact it is exempt from notice and comment requirements. See, e.g., *Reynolds Metal Co. v. Rumsfeld*, 564 F. 2d 663 669 (4th Cir. 1977) (Rule held not subject to Section 553 because it "neither diminishes nor increases the company's rights and duties under the Executive Order and Title VII."); *DiMaren v. INS*, 398 F. Supp. 556, 559 (D.C.S.D.N.Y. 1974) ("[O]nly rules that have a 'substantial impact on those regulated,' that is, ordinarily, rules that change '... existing rights and obligations,' are subject to the rulemaking requirements of Section 553.") (quoting *Lewis-Mota v. Secretary of Labor*, 469 F. 2d 478, 482 (2d Cir. 1972); *United States v. U.S.*

Trucking Corp., 317 F. Supp. 69, 71 (D.C.S.D.N.Y. 1973) (Rule revisions held not subject to notice and comment since they "merely reflect the technical changes necessitated by the adoption of the Department of Transportation Act and were 'not intended to create, alter, or revoke pre-existing substantive rights and duties.'").

Secondly, the final rule arguably appears to reflect the intention of the agency to allow the Secretary to unilaterally retrieve the delegated authority. As was indicated above, the proposed rule delegated unreviewable decisional authority to the Census Director over sampling determinations. The chairs of the House Committee and Subcommittee with jurisdiction over census, together with the majority party members of the Subcommittee, submitted legal and policy objections to the delegation. The objections were accompanied by legal memoranda from this Division which were placed in the public rulemaking record and which concluded that a divestiture of final decisionmaking authority with respect to duties and responsibilities vested by law in an agency head is appropriate only with the express consent of Congress and that purported examples of analogous delegations in other agencies submitted by the Department's general counsel were inapt. In the final rule the Secretary reiterated his belief that his broad statutory delegation authority supported the originally proposed unreviewable delegation since it could be revoked by instituting a new rulemaking. However, "in order to erase any doubt that the delegation is not a divestiture of obligations or responsibility by the Secretary," a new subsection 101(a) (5) was added to the final rule which states that "Nothing in this section diminishes the authority of the Secretary of Commerce to revoke or amend this delegation of authority or relieves the authority of the Secretary of Commerce of any responsibility for any decision made by the Director of the Census pursuant to this delegation," and that the delegation is to "remain in effect unless and until amended by the Secretary of Commerce." In the context of the congressional objection, and the substantial legal concerns it raised, a plausible reading of the amended final rule is that Secretary retained the power to retrieve his final review authority unilaterally, without the need to resort to a new rulemaking proceeding. If the amended final rule was meant to reiterate the Secretary's assertion that another rulemaking was the sole means to revoke or amend the delegation, it would have said so. Rather, the language used is a statement of the understood law of delegation from an agency head to a subordinate: it is revocable at the will of the agency head. Arguably, the amending language may be read to just say that, even apart from our view that informal rulemaking is not required for a rule establishing organizational and procedural processes.

In light of these two propositions, it appears that the new Secretary of Commerce might have the following options, in addition to a full dress notice and comment proceeding:

1. The Secretary might propose a rule revoking the delegation, allow a short period (15 days) for public comment and, at the close of the comment period, place announcement of the revocation of the delegation in the Federal Register to be effective immediately "for good cause." This would be a cautious approach which utilizes the good cause exemption of Section 553 (d)(3) which allows dispensing with the 30-day delayed effectiveness period where delay is shown to be unnecessary, impractical or contrary to the public interest. Good cause in this instance would be the imminence of the receipt by the Census Director of the advice of the Executive Steering Committee for Accuracy and Coverage Evaluation (ESCAP) and the Director's subsequent determinations on the basis of that advice, and need to inform agency subordinates and the public that the final determination will be made by the Secretary. The Secretary might also ground the revocation on the substantial legal doubt as to the delegation of final decisional authority in the Census Director and the need to assure that whatever determination is made is without any potential legal cloud.

2. The Secretary might announce, by placement of a notice in the Federal Register, that the delegation of final decisional authority with regard to the decennial census has been revoked and returned to the Secretary. This option would be based on the view that Section 101.1 (a)(5) of the rule was intended to leave unilateral authority with respect to the delegation to the Census Director in the hands of the Secretary as well as the argument that the rule, not being substantive in nature, need not be promulgated in accordance with the requirements of Section 553. Federal Register publication satisfies the requirements of 5 U.S.C. 552 (a)(1).

If you have further questions or need further assistance, do not hesitate to call.